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9 Attorneys for Defendant and Counterclaim Plaintiff
10 KEATING DENTAL ARTS, INC.

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 SOUTHERN DIVISION

14 JAMES R. GLIDEWELL DENTAL
15 CERAMICS, INC., DBA
16 GLIDEWELL LABORATORIES,
17 a California corporation,

18 Plaintiff,

19 vs.

20 KEATING DENTAL ARTS, INC.,
21 a California corporation,

22 Defendants.

23 KEATING DENTAL ARTS, INC.
24 a California corporation,

25 Plaintiff,

26 vs.

27 JAMES R. GLIDEWELL DENTAL
28 CERAMICS, INC., DBA
GLIDEWELL LABORATORIES,
a California corporation, and
DOES 1 THROUGH 5, inclusive,

Defendants.

Civil Action No.
SA-CV-11-01309-DOC(ANx)

**ANSWER, AFFIRMATIVE
DEFENSES, AND
COUNTERCLAIMS FOR
(1) FEDERAL UNFAIR
COMPETITION; AND
(2) CALIFORNIA UNFAIR
COMPETITION**

JURY TRIAL DEMANDED

Defendant Keating Dental Arts, Inc. ("Keating") hereby responds to the
Complaint in the above-identified matter, in paragraphs numbered to correspond

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1 to those of the Complaint:

2 1. Defendant admits that Plaintiff is seeking monetary damages and
3 injunctive relief with respect to the claims presented in this Complaint, but denies
4 that Plaintiff is entitled to any such relief. Otherwise, Defendant lacks knowledge
5 or information sufficient to form a belief about the truth of the allegations.

6 2. Defendant admits the allegations of paragraph 2, except as to Plaintiff's
7 allegation that the parties offer "essentially the same products to essentially the
8 same purchasers in the same market place," an allegation that Defendant denies.
9 Among other things, Defendant believes that Defendant's products are superior to
10 those of Plaintiff.

11 **JURISDICTION AND VENUE**

12 3. Without admitting the substantive truth of Plaintiff's pleadings,
13 Defendant admits the allegations of paragraph 3.

14 4. Defendant admits the allegations of paragraph 4.

15 5. Defendant denies that it has committed any acts of infringement, in this
16 District or elsewhere. Otherwise, and without admitting the substantive truth of
17 Plaintiff's pleadings, Defendant admits the allegations of paragraph 5.

18 **FACTUAL ALLEGATIONS**

19 6. Defendant admits that the publicly available record regarding U.S.
20 Trademark Reg. No. 3,739,663, including the information reflected on that
21 registration, is as stated. Otherwise, Defendant lacks knowledge or information
22 sufficient to form a belief about the truth of the allegations of paragraph 6.

23 7. Defendant lacks knowledge or information sufficient to form a belief
24 about the truth of the allegations of paragraph 7.

25 8. Defendant lacks knowledge or information sufficient to form a belief
26 about the truth of the allegations of paragraph 8, except that Defendant denies that
27 the reputation of Plaintiff's relevant products is extremely positive.

28 9. Defendant admits the allegations of paragraph 9, except as to the last

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1 sentence, as to which Defendant lacks knowledge or information sufficient to form
2 a belief about the truth of the allegation.

3 10. Defendant denies the allegations of paragraph 10.

4 11. Defendant lacks knowledge or information sufficient to form a belief
5 about the truth of an allegation admits the allegations of paragraph 11, except as to
6 the fact and substance of the letter from Plaintiff's attorney. Defendant denies that
7 any of the substance of that letter is true.

8 **FIRST CAUSE OF ACTION – INFRINGEMENT OF A FEDERALLY**
9 **REGISTERED TRADEMARK**

10 12. Defendant repeats and incorporates by reference the allegations set forth
11 in paragraphs 1 through 11 above, as if set forth fully herein.

12 13. Defendant admits that it has used in commerce the term KDZ BRUXER
13 as a trademark in connection with advertising of, sale of, or offer to sell dental
14 prostheses. Otherwise, Defendant denies the allegations of paragraph 13.

15 14. Defendant admits the allegations of paragraph 14, and Defendant further
16 alleges that Plaintiff's consent or authorization was not required or needed for
17 Defendant's actions.

18 15. Defendant denies the allegations of paragraph 15.

19 16. Defendant denies that Plaintiff's alleged trademark is or has been
20 infringed by any activity of Defendant; otherwise, Defendant lacks knowledge or
21 information sufficient to form a belief about the truth of the allegations of
22 paragraph 16.

23 17. Defendant admits learning at some time of Plaintiff's adoption and use
24 of Plaintiff's alleged trademark, subsequent to Plaintiff's adoption and use of that
25 alleged trademark. Otherwise, Defendant denies the allegations of paragraph 17.

26 18. Defendant denies that Defendant uses any trademark that is confusingly
27 similar to any valid trademark rights that Plaintiff may have. Defendant admits
28 that Plaintiff has no control over the composition or quality of Defendant's

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1 products. Defendant denies that Defendant's products are inferior to those of
2 Plaintiff. Defendant lacks knowledge or information sufficient to form a belief
3 about the alleged valuable goodwill and related expense and effort alleged by
4 Plaintiff. Otherwise, Defendant denies the allegations of paragraph 18.

5 19. Defendant lacks knowledge or information sufficient to form a belief
6 about the value of any alleged goodwill of Plaintiff's business under Plaintiff's
7 alleged trademark; otherwise, Defendant denies the allegations of paragraph 19.

8 20. Defendant denies that it has committed any infringement, and otherwise
9 denies the allegations of paragraph 20.

10 **SECOND CAUSE OF ACTION - FALSE DESIGNATION OF ORIGIN**
11 **UNDER SECTION 43(a) OF THE LANHAM ACT**

12 21. Defendant repeats and incorporates by reference the allegations set forth
13 in paragraphs 1 through 20 above, as if set forth fully herein.

14 22. Defendant admits that Defendant has used and is using Defendant's
15 trademark KDZ BRUXER in commerce in connection with the advertising, sale,
16 and provision of dental prostheses. Defendant denies that its trademark KDZ
17 BRUXER infringes any valid rights of Plaintiff. Otherwise, Defendant denies the
18 allegations of paragraph 22.

19 23. Defendant denies that it needed authorization to use Defendant's
20 trademark, denies that Defendant's trademark infringes any valid rights of
21 Plaintiff, and otherwise denies the allegations of paragraph 23.

22 24. Defendant denies that it has committed any acts of false designation of
23 origin and false description, and otherwise denies the allegations of paragraph 24.

24 **THIRD CAUSE OF ACTION – UNFAIR COMPETITION UNDER**
25 **CALIFORNIA BUSINESS & PROFESSIONS CODE '17200 et seq.**

26 25. Defendant repeats and incorporates by reference the allegations set forth
27 in paragraphs 1 through 24 above, as if set forth fully herein.

28 26. Defendant denies the allegations of paragraph 26.

1 27. Defendant denies the allegations of paragraph 27.

2 28. Defendant denies the allegations of paragraph 28.


3 29. Defendant denies that Defendant has committed any wrongful acts, and
4 denies the allegations of paragraph 29.

5 30. Defendant denies the allegations of paragraph 30.

6
7 First Affirmative Defense




8 31. The word BRUXER within Defendant's trademark KDZ BRUXER
9 (AND DESIGN) (Defendant's Trademark) is a generic term, used and recognized
10 by dental professionals (and at least some of their patients who are affected with
11 the condition) to refer to persons suffering from, and/or treatments for, the
12 condition of bruxism. Bruxism is variously defined as "the involuntary or habitual
13 grinding of the teeth, typically during sleep," "gnashing of teeth," "involuntary
14 clenching of the teeth," and "a condition in which you grind, gnash or clench your
15 teeth." Because BRUXER is "generic" within the dental industry, no party
16 (including Plaintiff and Defendant) can claim exclusive rights to use that word for
17 products or services related to the condition or treatment of bruxism. Thus,
18 Plaintiff has no basis in law or fact upon which to assert any exclusive rights in the
19 word BRUXER, or to bring its Complaint against Defendant.



20 Second Affirmative Defense

21 32. Defendant's trademark is not confusingly similar to Plaintiff's alleged
22 BRUXZIR trademark. Defendant's trademark is NOT the word "BRUXER"
23 alone, but instead is Defendant's "main" trademark (, as further discussed
24 below) to which Defendant has added in smaller letters the generic word
25 BRUXER. Accordingly, there is no likelihood of confusion between the parties'
26 respective products.

27 33. In that regard, Defendant recently filed three applications in the U.S.
28 Patent and Trademark Office, to register its related product line trademarks, as
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shown in the table below:

<u><i>Keating Product</i></u> <u><i>Line</i></u>	<u><i>Serial No.</i></u>	<u><i>Trademark</i></u>
Bruxer	85287029	
Max	85287084	
Ultra	85287720	

34. As shown in that table, all three of Defendant's applications include the same "main" part of the mark: "KDZ (plus design)."  To distinguish between "grades" of those  products, Defendant uses the appended word Bruxer, Max, or Ultra.

35. As Defendant uses those appended words (one of which is the generic BRUXER term about which Plaintiff is complaining), they are NOT the "dominant" part of Defendant's trademarks. Instead, the large KDZ letters and the ovals surrounding those letters are much more dominant.

36. In each of those trademark application, Defendant has disclaimed the relevant appended word (thus, in Defendant's first-listed application in the table above, Defendant included the following disclaimer language: "NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BRUXER" APART FROM THE MARK AS SHOWN." Among other things, by including that disclaimer, Defendant acknowledges that those appended words are "generic" and that no party (including Plaintiff and Defendant) can claim exclusive rights to those

1 words.

2 Third Affirmative Defense

3 37. To be valid, Plaintiff's alleged trademark rights must be directed to
4 something OTHER than the generic term BRUXER. On information and belief,
5 Defendant coined its BRUXZIR mark as a corruption of the generic term
6 BRUXER and the material that is now commonly used to fabricate such bruxer
7 devices, zirconia. Because of the phonetic similarity of the last syllable of
8 BRUXER and the first syllable of ZIRCONIA, Plaintiff collapsed the two (by
9 replacing BRUXER's second syllable with ZIRCONIA's first syllable) to form a
10 single word BRUXZIR. By so doing, Plaintiff cannot NOW claim that its
11 corrupted spelling is infringed by persons (like Defendant) who continue to use
12 the generic term BRUXER. In other words, Plaintiff cannot remove BRUXER
13 from its general use within the industry, especially by filing a corrupted spelling of
14 that word. Plaintiff knew it could not obtain exclusive rights to the generic word
15 BRUXER, so it did not bother to apply to register same.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, demand is hereby made for trial by jury on all issues triable to a jury.

Respectfully submitted,

Dated: 2011-10-14

/J. Mark Holland/

J. Mark Holland

J. MARK HOLLAND & ASSOCIATES

Attorney for Defendant and Counterclaim

KEATING DENTAL ARTS, INC., a

California corporation

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